No. 88-1889

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JAMES F. NORTON, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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I.

THE ELEVENTH CIRCUIT'S DECISION THAT A FACIALLY DEFICIENT GENERAL WARRANT WHICH NO REASONABLY WELL-TRAINED OFFICER COULD OBJECTIVELY RELY ON WAS WITHIN THE "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE IS IN CONFLICT WITH THE DECISIONS OF THE FIRST, NINTH AND TENTH CIRCUITS AND WITH THIS COURT'S HOLDING IN *LEON*.

The government's Brief in Opposition suffers from fatal misconceptions regarding events that transpired in this case and holdings of cases cited in opposition to our Petition. When the Eleventh Circuit's Opinion is read in conjunction with the decisions of other circuits that have considered facially deficient general warrants in light of *Leon*'s good faith exception, it is clear that an irreconcilable and untenable conflict exists between the circuits which warrants review by this Court.

The government claims that recent decisions of the Ninth and First Circuits suggest that facially deficient general warrants may be relied upon in good faith under certain circumstances and that these courts have retreated from prior contrary holdings which has resulted in harmony between the circuits. In fact, no such change has occurred and the decisions of these circuits continue to be wholly at odds with the Eleventh Circuit. Indeed, the most recent pronouncements of the Ninth Circuit regarding application of the good faith exception to facially deficient warrants reject the government's claim and expressly recognize the conflict with the Eleventh Circuit.

In *Center Art Galleries-Hawaii, Inc. v. United States*, 875 F.2d 747 (9th Cir. 1989), the Court affirmed the suppression of evidence seized pursuant to a facially overbroad warrant and refused to apply the good faith excep-

tion.[1] The court specifically held that where a warrant is so overbroad as to be facially invalid, good faith reliance is necessarily precluded:

> In the present case, the warrants contained no meaningful restriction on which documents could be seized. The warrants were so overbroad that absent some exceptional circumstance no agent could reasonably rely on them.

Id. at 753, citing *United States v. Stubbs*, 873 F.2d 210 (9th Cir. 1989); *United States v. Dozier*, 844 F.2d 701, 708 (9th Cir. 1988), *cert denied*, ____ U.S. ____, 109 S.Ct. 312 (1988); and *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985).[2]

Thus, the government's claim that the Ninth Circuit has changed its position is simply wrong. There is no doubt that if the C&A and P&A "all records" warrants were reviewed by the Ninth Circuit, the evidence would have

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[1] The warrant called for seizure of specified categories of corporate documents (sales records, correspondence, complaint files, refund related documents, monthly account statements, etc.). The court rejected the government's claim, also raised here (Gov't Br., p.9), that an unattached and unincorporated affidavit could provide particularity lacking on the face of the warrant. 875 F.2d at 750. Erroneously believing that an unincorporated affidavit can create particularity, the government argues that the "all records" warrants were not overbroad. (Gov't Br., p.9) In addition to simply being wrong, the government overlooks the fact that in the trial court it admitted that the C&A and P&A warrants were general warrants. (R.75-91,93) Moreover, unlike the cases cited in the government's brief (pp.10-11), the affidavit here cannot provide the particularity lacking in the warrant since it was neither attached to nor incorporated in the warrant. *United States v. Gill*, 623 F.2d 540, 543 (8th Cir. 1980), *cert denied*, 449 U.S. 873 (1980). Indeed, in the trial court, the prosecutor admitted that the affidavit could not be used to establish particularly for the C&A and P&A warrants. (R.16-1724-37)

[2] The government admits that under *Dozier* and *Crozier* the good faith exception would not have been applied to the C&A and P&A warrants (Gov't Br., p.15)

been ordered suppressed and petitioners granted a new trial.

Similarly, in *United States v. Stubbs*, *supra*, the Ninth Circuit found the good faith exception inapplicable to a warrant calling for the seizure of specified categories of corporate documents which lacked specific descriptions of the items to be seized. Obviously, the "all corporate records" warrants at issue here do not even approach the level of specificity found constitutionally lacking in both *Stubbs* and *Center Art Galleries*.

The warrant in *Stubbs* was found constitutionally deficient because it did not provide objective standards by which an executing officer could determine what could be seized. The court held: "The warrant was not facially valid and thus could not have been relied upon in good faith." *Id.* at 212, citing, *Leon* at 923.[3] In *Stubbs*, the court expressly recognized that its holding was in conflict with the Eleventh Circuit's decision in *United States v. Accardo*, 749 F.2d 1477 (11th Cir. 1985), *cert denied*, 474 U.S. 949 (1985) (an earlier case concerning the C&A and P&A warrants). Thus, the government's claim that no conflict exists is simply wrong.

This undeniable conflict was also expressly recognized in *United States v. Burke*, ____ F.Supp. ____ (S.D.N.Y.

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[3] The rationale for the court's holding highlights the obvious conflict between the Eleventh and Ninth Circuits:

> The warrants should have been far more specific. No reason is given for the failure, and the IRS had the cooperation of two of Stubbs' former employees, both of whom knew where various documents were kept. The IRS knew both what the seizable documents look like and where to find them, but this information was not contained in the warrant. *Id.* at 211.

Agent Wagner had similar information here and declined to incorporate it in the warrant (R.75-14) Nevertheless, the Eleventh Circuit upheld the facially deficient C&A and P&A warrants finding good faith.

1989).[4] The court there applied the good faith exception to an overbroad warrant finding that no general search was conducted since the agents followed the limitations set forth in the search affidavit. The same cannot be said here where virtually every piece of paper relating to C&A and P&A and the personal and non-C&A/P&A business papers of their officers were carted out in the course of the search.[5] (R.2-372-3)

Significantly, the *Burke* court recognized that its holding conflicted with the Ninth Circuit's decision in *Center Art Galleries*, but was consistent with the Eleventh Circuit's opinion in *Accardo* (Slip Op. at 11,13,15). Thus, contrary to the government's argument, there is a recognized and unworkable conflict between the circuits on this point rendering review by this Court imperative.

The government, however, claims that the conflict between the Ninth and Eleventh Circuit has been resolved, citing *United States v. Luk*, 859 F.2d 667 (9th Cir. 1988), and *United States v. Michaelian*, 803 F.2d 1042 (9th Cir. 1986), which both predate *Center Art Galleries* and

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[4] In *Burke*, the court declined to apply the "all records" exception finding that the entity "was not entirely a boiler room operation . . . engaged only in fraudulent activities." (Slip Op.,p.10) The government is similarly wrong that the "all records" exception is applicable here. In this case, Judge Kehoe found and Agent Wagner admitted that C&A and P&A performed legitimate functions and, therefore, were not permeated with fraud, rendering the "all records" exception inapplicable. (R.4-659-2,3; 75-16.20) *United States v. Bentley*, 825 F.2d 1104, 1110 (7th Cir.), *cert denied*, ____ U.S. ____, 108 S.Ct. 240 (1987).

[5] The government contends that the search at C&A was narrowly drawn since documents pertaining to other corporate entities occupying space at C&A's offices were not taken. (Gov't Br., p.14) This begs the question since every record remotely related to C&A was in fact taken and it was found by the trial court and conceded by the prosecutor that there was not probable cause for such an all encompassing search. (R.87-144; 2-372-3; 4-659-3; 75-93)

Stubbs. Neither case is consistent with the Eleventh Circuit's decision and neither resolves the conflict between the circuits.

In *Luk*, the warrant was upheld because the agents conducted the search in strict conformity with the particularized search affidavit and seized only limited documents for which there was probable cause. 859 F.2d at 678. The court emphasized "this was not a general exploratory rummaging in a person's belongings." *Id.* This was obviously not the case here. (*See*, fn.5 *supra*) Here, by the trial judge's express findings and the prosecutor's admissions in the trial court, the scope of the warrant and subsequent search exceeded any showing of probable cause that was established in the affidavit. *Id.*

In *Michaelan*, good faith was found because the warrant limited the items to be seized to specified documents generated in restricted time periods and was scrutinized at four different levels of attorney review. Indeed, *Michaelian* involved a facially valid warrant. 803 F.2d at 1046. Here, however, like *United States v. Dozier*, *supra*, the warrant set no parameters for the search and impermissibly allowed a general seizure of all records.

In further arguing that no conflict exists, the government claims that in *United States v. Leary*, 846 F.2d 592 (10th Cir. 1988), the Court did not hold that officers could not rely in good faith on a facially overbroad warrant. (Gov't Br., p.17) To the contrary, the court expressly found the warrant so facially deficient that it could not be relied upon in good faith. 813 F.2d at 610.[6]

Finally, the government claims that the warrants here were not obviously overbroad and that the court below

[6] At the instant good faith hearing, Professor Blakey testified that the general warrants here constituted "generality with a vengeance" which by their nature necessarily and impermissibly allowed unbridled discretion and constitutional violation. (R.75-65,76)

so found. (Gov't Br., p.12)[7] This is patently untrue. Here, the trial judge specifically found:

> If these warrants are upheld, the entire meaning and intent of the Fourth Amendment would be impaired as it pertains to particularly describing the items to be seized. (App.32)

Further, Judge Kehoe expressly found that the C&A and P&A warrants were so general that their invalidity would have been apparent to an "eighth grade civics student." (R.75-105) For the government to argue that this obvious invalidity would not have been apparent to a professionally trained FBI agent is absurd.

The trial court's ruling on good faith in light of these findings is appalling particularly since Agent Wagner admitted that he knew warrants had to describe the documents to be seized as clearly and particularly as possible, and Professor Blakey testified that in 1976 no reasonably well-trained officer would have believed the C&A and P&A warrants were valid. (R.75-76) Because the Eleventh Circuit's finding of good faith under these circumstances is in conflict with other circuits and is legally indefensible, review by this Court is necessary.

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[7] The government further claims that good faith is established since the affidavit was reviewed by two proseuctors and a magistrate issued the warrant. (Gov't Br., p.13) That does not establish good faith here since Agent Wagner admitted through his training he knew a warrant had to describe items to be seized as particularly as possible (R.75-41), he received no assurances that the warrant comported with the particularity requirement and no limitations were placed on the warrant's scope. *Massachusetts v. Sheppard*, 468 U.S. 981 (1984); *United States v. Dozier, supra*; *United States v. Kepner*, 843 F.2d 755, 763-64 (3d Cir. 1988); *Center Art Galleries, supra*. Indeed, the Magistrate issuing the warrant in this case was criticized for issuing other impermissibly general warrants. *United States v. White*, 541 F.Supp. 1181, 1185-86 (N.D. Ill. 1982). This is clearly not a case where the agents took every step that reasonably could be expected of them. Rather, as Professor Blakey testified, a reasonably trained officer would not have executed the warrants. (R.75-75)

II.

THE ELEVENTH CIRCUIT'S DECISION ON THE JURY COERCION ISSUE IS IN CONFLICT WITH THE DECISIONS OF THE EIGHTH AND NINTH CIRCUITS AND IS CONTRARY TO LAW.

Petitioners' opening brief demonstrated that the instant jury verdict was rendered in a coercive environment and that the Eleventh Circuit's affirmance resulted in an unworkable conflict between the circuits. The government's brief ignores the facts of this case and presents an erroneous statement of the law to mask the conflict caused by the Eleventh Circuit's decision.

In the vast majority of the cases cited by the government, the numerical division of the jury as to guilt and acquittal was not revealed to the court.[8] Contrary to the

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[8] *Bowen v. United States*, 153 F.2d 747, 752 (8th Cir. 1946), *cert. denied*, 328 U.S. 835 (1946), *United States v. Akbar*, 698 F.2d 378, 380 (9th Cir. 1983), *cert. denied*, 461 U.S. 959 (1983), *United States v. Diggs*, 525 F.2d 1310, 1322 (D.C. Cir. 1975), *cert. denied*, 429 U.S. 852 (1976), *United States v. Sawyers*, 423 F.2d 1335, 1340-41 (4th Cir. 1970), *Gafford v. Warden*, 434 F.2d 318, 319 (10th Cir. 1970), *United States v. Cook*, 663 F.2d 808, 809 n.3 (8th Cir. 1981), *United States. v. Warren*, 594 F.2d 1046, 1049 n.3 (5th Cir. 1979), *United States v. Rengifo*, 789 F.2d 975, 985 (1st Cir. 1986), and *United States v. Rao*, 394 F.2d 354, 356 (2d Cir. 1968), *cert. denied*, 393 U.S. 845 (1968), are cases where the trial courts were *not* informed of the numerical split of the jury as to guilt and acquittal. Rather, these cases involve situations where the trial court was aware of a deadlock, without any reference to whether the jury favored conviction or acquittal, and gave a modified *Allen* charge. The other cases cited by the government, *Sanders v. United States*, 415 F.2d 621, 629 (5th Cir. 1969), *cert. denied*, 397 U.S. 976 (1970), and *United States v. Jennings*, 471 F.2d 1310, 1314 (2d Cir. 1973), *cert. denied*, 411 U.S. 935 (1973), involve disclosures to the trial courts of the conviction/acquittal position of the jury in factual contexts different from that of the instant case. For instance in *Sanders*, defense counsel concurred in the giving of a modified *Allen* charge after the disclosure was made to the court, indicating that the "potential for coercion . . . was not apparent to one on the spot." *Lowenfield v. Phelps*, 484 U.S. 231 (1988).

government's contention, the inquiry or lack of inquiry by a trial court is not the crucial issue. What is important is the jury's *knowledge* of the judge's awareness of its division. *United States v. Sae-Chua*, 725 F.2d 530, 531 (9th Cir. 1984).

The government attempts to distinguish *Sae-Chua, supra*, as a case decided on its own particular circumstances.[9] However, the circumstances of *Sae-Chua* are virtually identical to those of this case. Both cases involved unsolicited disclosures to the trial court of an eleven to one guilt-acquittal division of the jury, followed by a modified *Allen* charge which produced a verdict approximately four hours later. The coercive environment here is even more severe than that of *Sae-Chua* since this case involved a dissenting juror proclaiming duress and seeking replacement.[10]

The government argues that after numerical disclosure, the "modified *Allen* charge was not likely to have intimidated Larson" [the dissenting juror] (Gov't Br., p.20) because the charge was addressed to all of the jurors and not simply to Larson.

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[9] The government attempts to distinguish *Holt v. Wyrich*, 649 F.2d 543 (8th Cir. 1981), by claiming that *Holt* approved a mistrial and did not involve a coerced verdict. The government fails to recognize that the Eighth Circuit found that a mistrial was required due to the coercive nature of the proceedings. See *Holt* at 551 (juror's knowledge that judge knew numerical division inherently coerced minority to agree on verdict).

[10] The government argues that the jury's deliberation for approximately four hours after the verdict-urging instruction evidences non-coercion. However, the totality of the circumstances control whether a supplemental charge is unduly burdensome and the elapsed time is but one factor. The four hour period here included waiting time for counsel to be summoned to court, thus the verdict was obviously reached much sooner than that. This case lasted several weeks with voluminous testimony and exhibits. When viewed in this context, the verdict promptly followed the coercive instruction.

This argument ignores the obvious. Larson certainly knew that he was the cause and target of the modified *Allen* charge. Once the numerical division was disclosed, Larson and the rest of the jury knew that an *Allen* charge, encouraging a unanimous verdict, was directed solely at him. In that setting, the language of the instruction encouraging a "reexamination of views" was certainly more likely to be heeded than any statement about maintaining one's "individual judgment."

The government distorts *Lowenfield v. Phelps*, 484 U.S. 231 (1988), and other Supreme Court authority[11] to support its position. In *Lowenfield*, this Court specifically found significant that the numerical division of the jury had not been disclosed. That was not the case here. Also *Lowenfield* unlike this case, lacked a coercive atmosphere demonstrated by the defense's lack of objection to the supplemental instruction.

Larson's self-proclaimed duress highlights the coercive environment which compelled this verdict. It must be viewed in context with the fact that the precise numerical division of this jury was disclosed to the court followed by a modified *Allen* charge encouraging re-examination of views. A coerced verdict of guilty was inevitable. Certiorari is warranted to resolve the conflict caused by the Eleventh circuit's erroneous decision.

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[11] Although the government cites *Kawakita v. United States*, 190 F.2d 506, 521-528 (9th Cir. 1951), *aff'd* 343 U.S. 717 (1952), this Court did not address jury coercion there. Similarly in *Lias v. United States*, 284 U.S. 584 (1931), there was no indication from the jury as to its numerical division and this Court simply upheld the general use of a modified *Allen* charge to a deadlocked jury.

CONCLUSION

Accordingly, for the reasons stated in our Petition and for additional reasons cited herein, a Writ of Certiorari should issue to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit.

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